No. 11236.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BOWER-GIEBEL WHOLESALE CO., a copartnership composed of Earl E. Bower and Walter Hamilton Bower,

Appellant,

vs.

SEARS, ROEBUCK AND CO., a corporation,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Statement of the Case.

The findings of fact [Tr. pp. 38-43] made by the Honorable Leon R. Yankwich in the District Court of the United States would appear to afford an adequate statement of the case were it not for the fact that appellant (hereinafter sometimes referred to as seller) saw fit to make a statement of the case in its opening brief that is erroneous and misleading in that it is based (1) on appellant's partial statement of the evidence that does not reflect in any way the evidence supportng the findings made by the District Court; (2) on misstatements of the evidence; and (3) on statements that do not find support in the evidence. Under such circumstances, appellee (here-

inafter sometimes referred to as buyer or Sears), is compelled to make a more detailed statement of the case than is otherwise customary.

On October 20th, 1943, Ralph Ashby, candy buyer for Sears, at the request of Earl Bower, managing partner of seller, called at Bower's office [Tr. pp. 55, 165, 267, 291]. There, in the presence of R. E. Mitchell and Alphonse Erhart, candy brokers, Ashby was shown a 10-pound sample of Pan-O-Butter fudge. After examining the sample, which was first-class, and upon representations as to the quality made to him, Ashby, for buyer, placed an order with seller for 28,000 pounds at 55¢ a pound. [Ex. A, Tr. p. 60.] A subsequent sample was sent by the manufacturer to seller and shown to Ashby to comply with his request that the candy contain more nuts. On October 21st, 1943, seller placed an order for 200,000 pounds with the manufacturer at 50¢ a pound. (In the order dated October 21st, 1943, the manufacturer's name was McClure Co., subsequently named as Karmel Korn Komissary.) [Exs. LL and MM, Tr. pp. 329, 330.]

The first shipment of fudge was received by buyer November 15th, 1943. Subsequent shipments were received to and including December 4th, 1943. [Ex. II. Tr. pp. 253-254.] Distribution was made by Sears to its various stores in the Los Angeles district, the first candy being received in its Pasadena store on November 18th, 1943. [Ex. EE, Tr. p. 241.] On or about November 25th, 1943, as Ashby testified [Tr. pp. 63, 64],

or on November 29th, as Bower testified [Tr. p. 297], Ashby took a sample of the moist fudge received at the 9th Street store to Bower at his office. It was "extremely moist, wet." [Ashby, Tr. pp. 64, 115.] ". . . was a bagful of soft fudge like putty." [Bower, Tr. p. 314.] ". . . and is so wet and soggy that it would compare better with mush than fudge. The fudge is so moist and soft that it does not stand up under its own weight. even an inch thick." [Ex. 7.] Ashby also advised Bower that some of the fudge he examined was moldy. [Tr. pp. 128-129.] He notified Bower that he would not accept any more fudge and would stop payment on the fudge received. [Tr. pp. 117, 122.]

Thereafter Bower sent Erhart to examine the fudge and to attempt to procure its acceptance. [Ex. 7.] Erhart examined some three of four cartons of the fudge, found that it was moist, and suggested that the moist fudge would dry out if exposed to the air. [Tr. p. 169.] Ashby told Erhart he would try it and would accept a 90-pound adjustment on fudge that was examined and was definitely unsalable until all the fudge could be checked to see what part was unsalable. [Tr. p. 68.] The same day he called Bower and told him that he would try Erhart's suggeston, would sell the fudge that was salable, and a settlement would be made on the part that was unmerchantable. [Tr. pp. 70, 366-368.]

Prior to Christmas Ashby kept Bower advised as to the condition of the candy and stated on numerous occasions that the fudge was not satsfactory. [Tr. pp. 71,

330-332, 334-335, 370-371, 373.] Prior to Christmas, Bower discussed with the manufacturer the fact that Sears planned to make a claim for defective fudge. The manufacturer, according to Bower, agreed to make a settlement for it. [Tr. pp. 146, 330-332, 334-335, 370-371, 373.]

The fudge, upon its arrival at the various stores, was very moist in part, very hard in part, moldy in part, and some part of it was salable. [Tr. p. 83, Hollywood store; pp. 183-184, 9th Street store; p. 195, Vermont store; p. 204, Long Beach store; pp. 210-211, Pico store; pp. 219, 225-226, Glendale store; p. 233, San Diego Store; pp. 242-243, Pasadena Store.] Efforts were made to dry the moist fudge at Mr. Ashby's direction, but this was helpful only as to a part of the moist candy. [Ex. Y, Tr. pp. 84, 186, 188, 196, 219, 229, 247.]

On December 10th, 1943, Bower received his first shipment of fudge after delivery of the 28,000 pounds to Sears. [Tr. pp. 328, 331-332.] On December 14th, 1943, he cancelled checks issued and outstanding to the manufacturer [Tr. p. 328] and refused further shipments.

As the result of telephone calls from Bower to the manufacturer in which Bower complained of the defective fudge, including that produced by Sears, Victor Pocius, the manufacturer, came to Los Angeles prior to New Year's to settle with Bower for the defective fudge. [Tr. pp. 144, 333-336, 370-371, 373.] The manufacturer admitted that the candy examined by him in Bower's

office in December, 1943, was not merchantable. [Tr. pp. 144, 149-150, 161-162.] A settlement between manufacturer and Bower was arrived at covering the entire amount of fudge shipped by the manufacturer to Bower. [Finding VI, Tr. pp. 41, 146, 151-155, 161-163.]

On January 4th, 1944, Ashby took a 9 pound slab of the fudge to Bower's office. It was so hard that when dropped on the cement floor it did not break. [Tr. p. 72.] Bower sent Erhart and Mitchell on January 12th, 1944 to the 9th Street store. They examined with Ashby a number of the original unpacked cases of fudge in the store room. Some part was moldy, another part was dried out and chalk-like, the greater part of it (Erhart testified 70% to 75%) was not salable. [Tr. pp. 75. 171-172, 176-178, 273.] They reported to Bower, who said he would handle the matter from there. [Tr. p. 172.] On January 12th, 1944, Ashby stopped payment on the Bower-Giebel account. [Tr. pp. 127-128, 366-367.] On January 20th he wrote to Bower, demanding immediate settlement. [Ex. H, Tr. p. 100.]

The candy was properly stored and kept in unheated, cold or very cool store rooms in the retail stores. [Tr. pp. 81, 212, 221, 235-236, 246.] Stored under such conditions, the fudge, if properly prepared, should have kept from a minimum of 4 months to a year. [Tr. pp. 362, 369.]

At Ashby's request all unsalable candy was returned by the various Sears stores to the central warehouse between January 21st and January 31st, 1944. 9,620

pounds of unsalable fudge were returned to the pool stock warehouse. [Ex. KK, Tr. pp. 85, 182, 186, 194, 197, 204-205, 212, 227, 234-235, 243.] The candy was purchased to sell at 89¢ a pound and that part of the fudge that was salable that was sold prior to January 6th-January 15th, 1944, was sold at 89¢ a pound. [Tr. pp. 87, 183, 195, 213-214, 226-227, 232, 242.] The remainder of the salable candy was sold at 69¢ a pound. In computing the amount of damage for breach of warranty, the District Court allowed 69¢ a pound on the 9,620 pounds of the unsalable fudge inasmuch as the candy had been paid for in full.

Appellant's statement of the case is inaccurate and misleading in the following particulars:

1. A stipulation was not entered into that the sum of $7,738.99, together wth interest at the rate of 7% per annum from January 14th, 1944, was due, owing and unpaid to the appellant as appellant states. (App. Br. p. 3, lines 25-28.) It was stipulated that no proof would be necessary to establish the fact that goods, wares and merchandise of a value of $7,738.99 had been delivered by Bower-Giebel to Sears, and that no payment had been made for such merchandise.

2. Ashby did not testify that he did not rely upon any custom or usage in the business as appellant states. (App. Br. p. 4, lines 12-14.) Ashby testified that he did rely in part on custom and usage in the business. [Tr. p. 110.] On further examination, Ashby admitted that

in his deposition taken prior to trial he had stated that he did not rely upon any custom or usage. [Tr. p. 111.]

3. It is not true that in the original sale discussion appellant had very little to say and that most of the conversation was carried on by the appellee's representative, Mr. Ashby, and the factory representatives, Mr. Erhart and Mr. Mitchell. Mr. Mitchell, witness for appellant, testified "Mr. Bower then related to Mr. Ashby what Mr. Erhart and I had told him in regard to the fudge." [Tr. p. 267.] It is apparent from the testimony of witnesses Erhart and Mitchell, as well as Ashby, that the discussion of the fudge was carried on in large part between Bower and Ashby. [Tr. pp. 166, 267-268, 291-295.]

4. Bower did not give the factory representatives a check in the sum of $7,000 in partial payment of appellant's order to the manufacturer in the presence of Mr. Ashby, as appellee states. ((App. Br. p. 4, lines 22-26.) The record is clear that the $7,000 was sent under cover of a letter dated October 21st, 1943. [Ex. LL, Tr. pp. 328-329.]

5. It is not true that the factory representatives then called upon Mr. Ashby and showed Mr. Ashby how to handle the fudge and thereby dispose of the same, as appellant states. (App. Br. p. 5, lines 21-23.) Erhart testified that he called upon Ashby at Bower's request, found the candy wet, that he told Ashby that he believed the moisture in the fudge was caused by sweating due to high altitude and warmer climate, and that the moisture would

dry out if exposed to the air over night. [Tr. p. 169.] Ashby testified that the fudge that was examined was wet and moist and beginning to mold and in some cases was beginning to mold around the nuts [Tr. p. 66]; that he told Erhart he would attempt to dry it out but could not ascertain the amount of fudge that was unsalable without going through all of the cases; that he would go along with the 90 pound adjustment until he was able to find out exactly how much was unsalable. [Tr. pp. 66, 68, 366-368.]

6. Ashby did not advise Bower that he could use the fudge as appellant states. (App. Br. p. 5, lines 23-25.) Ashby testified that he told Bower he would use the salable part of the fudge and that a settlement would be made later as to the part of the fudge that was unsalable. [Tr. pp. 68, 70, 366-368.] Appellant did not rely upon Ashby's statement in making payment for the fudge. [Tr. pp. 331, 332, 370, 371, 373.]

7. It is not true that from December 2nd, 1943, to January 12th, 1944, the appellant received no notice that the fudge was not salable. The record is replete with instances of notice from Ashby to Bower that the fudge was unsatisfactory and unmerchantable. [Tr. pp. 68, 71, 330, 332, 334, 335, 366-367, 370, 371, 373.]

8. It is not true that Mr. Ashby admitted that he had overbought. Mr. Ashby was definite in his denial that he had ever stated that he had overbought Pan-O-Butter fudge. [Tr. pp. 126, 360, 361, 363.]

ARGUMENT.

I.

Interest Was Not Allowable to Appellant From January 14, 1944 Until Entry of Judgment on the Amount of Appellee's Counterclaim.

Appellant mistakenly construes the action of the District Court in not allowing interest from January 14th, 1944 until the date of entry of judgment on that part of appellant's claim that was offset by appellee's damage for the breach of warranty. Appellant sued to recover moneys alleged to be due from appellee. Appellee pleaded that it was not indebted to appellant by reason of the damage suffered by appellee from breach of warranty. The court found that on January 14th, 1944 the claim of the appellant for the sum of $7,738.99 was offset in the sum of $6,637.80 [Finding VIII, Tr. p. 42], and that appellant was entitled to judgment for the difference, or the sum of $1,109.19. To sustain appellant's argument would result in the allowance of interest to appellant on a sum that the District Court found was not due and owing to appellant as of January 14th, 1944. Obviously, when the debt or a part thereof is discharged, interest ceases. *Coleman v. Commins, 77* Cal. 548, 20 Pac. *77*, 80.

If the action of the District Court had the effect that appellant contends, namely, that the District Court allowed interest on appellee's counterclaim arising out of breach of warranty from January 14th, 1944 until the date of the entry of judgment, nevertheless such action would be

proper. *Brandenstein v. Jackling,* 99 Cal. App. 438, 278 Pac. 880 (hear. den.), *Barrett Co. v. Panther Rubber Mfg. Co.,* 24 F. (2d) 329 (C. C. A. 1).

Krasilnikoff v. Dundon, 8 Cal. App. 406, 97 Pac. 172, cited by appellant in its brief (page 8) does not sustain the proposition for which appellant cites it. The Court found that the damages were not certain upon the face of the contract and could not be made certain by calculation inasmuch as they were dependent upon evidence as to values in Siberia and therefore held that interest was not allowable until entry of judgment.

Armstrong v. Lassen Lumber & Box Co., 260 Pac. 810, cited by appellant in its brief (page 8) of course is not authority for any legal principle inasmuch as it was superseded for all purposes when hearing was granted by the Supreme Court.

In any event, *Brandenstein v. Jackling, supra,* being a later case, is controlling.

II.

Buyer Gave Notice of Breach of Warranty Within a Reasonable Time.

The District Court found

> "Defendant, upon discovery of the unmerchantable quality and condition of said candy and that it did not conform to the quality of the samples, immediately notified the plaintiff that the candy was of unmerchantable quality and condition and did not conform to the samples." [Finding IV, Tr. p. 40.]

and

> "Defendant continuously advised plaintiff of the unmerchantable quality of substantial portions of the

shipments of candy as such shipments were received and further, advised plaintiff that it would be required to pay defendant's losses for the unmerchantable portions of said candy." [Finding V, Tr. p. 41.]

Appellant's argument that buyer did not give notice of the breach of warranty within a reasonable time is in effect that there was no evidence to sustain the findings made by the District Court. *Federal Rules of Civil Procedure,* Rule 52-A, 28 U. S. C. A. following Section 723c, *Gates v. General Casualty Co. of America,* 120 F. (2d) 925 (C. C. A. 9), *M-G-M Corp. v. Fear,* 104 F. (2d) 892, (C. C. A. 9).

Manifestly, the evidence amply supports the findings made by the District Court. It appears that the first shipment of fudge was received by buyer at its pool stock warehouse on November 15th, 1943. Subsequent shipments were received to and including December 4th, 1943. [Ex. II, Tr. pp. 253-254.] Distribution was made by Sears to its various stores in the Los Angeles District, the first candy being received in the Pasadena store on November 18th, 1943. [Ex. EE, Tr. p. 241.] On or about November 25th, 1943, Ashby, upon complaint from the stores that part of the candy was too soft to be salable and some part of it was moldy, took a sample of the moist fudge received in the 9th Street store to Bower's office. [Tr. pp. 63, 64.] It was "extremely moist, wet," [Tr. pp. 64, 115], "a bagful of soft fudge, like putty" [Tr. p. 314], "and is so wet and soggy that it would compare better with mush than fudge. The fudge is so wet and moist that it does not stand up under its own weight even an inch thick." [Ex. 6, Tr. p. 299.]

Ashby also advised Bower that some of the fudge he examined was moldy. [Tr. pp. 65, 128-129.] He notified Bower that he would not accept any more fudge and would stop payment on the fudge received. [Tr. pp. 117, 299.] Thereafter Bower sent Erhart to examine the merchandise and to attempt to procure its acceptance. [Ex. 7.] Erhart examined some three or four cartons of fudge, found that it was moist, and suggested that the moist fudge would dry out if exposed to the air. Some of the fudge was beginning to mold. [Tr. p. 66.] Ashby told Erhart that he would accept a 90 pound adjustment on fudge that was examined and was definitely unsalable until all the fudge could be checked to see what part was unsalable. [Tr. p. 68.] The same day Ashby called Bower and told him he would try Erhart's suggestion. It was agreed that he would sell the fudge that was salable and a settlement would be made on the part that was not salable. [Tr. pp. 70, 366-368.] Prior to Christmas Ashby kept Bower advised as to the condition of the candy and stated on numerous occasions that the fudge was not satisfactory. [Tr. pp. 71, 330-332, 334-335, 370-371, 373.] Prior to Christmas Bower discussed with the manufacturer of the fudge the fact that Sears planned to make a claim for the defective fudge. The manufacturer, according to Bower, agreed to make a settlement for it. [Tr. pp. 330-332, 334-335, 370-371, 373.]

On December 30th, 1943, the manufacturer came to Los Angeles to make a settlement with Bower for the defective fudge. [Tr. pp. 144, 333-336, 370-371, 373.] The manufacturer admitted that the candy examined by him in Bower's office was not merchantable. [Tr. pp. 149-150.] A settlement between the manufacturer and Bower was arrived at covering the entire amount of the

fudge shipped by the manufacturer to Bower. [Finding VI, Tr. pp. 41, 146, 151-155, 161-163.]

On January 4th, 1944, Ashby took a 9 pound slab of fudge to Bower's office. It was so hard that when dropped on the cement floor it did not break. [Tr. p. 72.] Bower sent Erhart and Mitchell to the 9th Street store on January 12th, 1944, where they examined with Ashby a number of the original unpacked cases of fudge in the store room. Some part was moldy, another part was dried out and chalk-like, the greater part of it was not salable. [Tr. pp. 75, 171-172, 176-178, 273.] They reported to Bower, who said he would handle the matter from there. [Tr. p. 172.] On January 20th, 1944, Ashby wrote to Bower, demanding immediate settlement. [Ex. H, Tr. p. 100.]

The foregoing evidence, it is submitted, demonstrates full compliance by the buyer with the requirements of Section 1769, *Civil Code* as to character of notice given and time within which it was given in the light of the well established line of decisions in California.

Noll v. Baida, 202 Cal. 98, 259 Pac. 433;

North Alaska Salmon Co. v. Hobbs, Wall & Co., 159 Cal. 380, 113 Pac. 870, 120 Pac. 27;

Pederson v. Goldstein, 70 A. C. A. 210, 160 P. (2d) 878;

Drumar Mining Co. v. Morris Ravine Mining Co., 33 Cal. App. (2d) 492, 92 P. (2d) 424;

Brandenstein v. Jackling, supra;

Western Iron Works v. Smith, 103 Cal. App. 486, 284 Pac. 715;

Gibson v. Cruikshank, 78 Cal. App. 652, 248 Pac. 732;

Dolan v. Carmel Canning Co., 71 Cal. App. 197, 234 Pac. 926;

Ray v. American Photo Player Co., 46 Cal. App. 311, 189 Pac. 130;

Lichtenthaler v. Samson Iron Works, 32 Cal. App. 220, 162 Pac. 441.

It is significant that appellant does not cite any California cases to support his argument that buyer failed to give notice of alleged breach of warranty within a reasonable time. It is evident, however, from an examination of the evidence that the facts of the instant case fully satisfy the requirements of any of the cases cited by appellant inasmuch as the buyer not only gave notice to seller of the defective quality of the fudge, but also unmistakably advised him that the fudge was being retained only upon the understanding that a settlement for the defective fudge would be made when the full extent of its defective character was ascertained. [Tr. pp. 70, 366, 368.] On the basis of such notice Bower notified the manufacturer that Sears planned to make a claim for its defective fudge. [Tr. pp. 330-332, 334, 335, 370-371, 373.]

Truslow & Fulle v. Diamond Bottling Co., 112 Conn. 181, 151 Atl. 492, cited by appellant (Br. p. 9) is also distinguishable inasmuch as it appears that no finding had been made in the lower court that any notice of the breach of warranty had been given. The Supreme Court of Connecticut held that in the absence of an express finding it could not hold as a matter of law that the notice of

defect that had been given was a compliance with the statutory requirement. The Court's conclusion is contained in the next to the last sentence of the opinion:

> "Since neither as a matter of law nor by finding of the Court does it appear upon the record that there was a compliance with the provision of the statute requiring notice by the defendant to the plaintiff of a breach of warranty within a reasonable time, the judgment upon the counterclaim cannot stand."

Similarly, *Nashua River v. Lindsay,* 242 Mass. 206, 136 N. E. 358, cited by appellant in its brief (Br. p. 9) expressly holds that complaints as to the quality of merchandise may be found to be sufficient notice of a breach of warranty to comply with the requirements of the statute.

In a later case, *Jamrog v. H. L. Handy Co.* (Mass.), 187 N. E. 540, the Supreme Court of Massachusetts, citing the *Nashua River* case as authority, held that a finding of adequate notice to meet the statutory requirement may be based upon complaints as to quality of the merchandise. See, also, *Guthrie v. J. J. Newberry Co.* (Mass.), 8 N. E. (2d) 774.

In *American Manufacturing Co. v. U. S. Shipbuilding Board,* 7 F. (2d) 565 (C. C. A. 2), and *Wildman Manufacturing Co. v. Davenport Hosiery Mills,* 147 Tenn. 561, 249 S. W. 984, cited by appellant (Br. p. 10), it appears that delays in delivery formed the basis of the counterclaim rather than any breach of warranty involving quality of the merchandise. In these two cases it was held that notice was not given within a reasonable time under the particular circumstances before the court.

In *Bell v. Main,* 49 Fed. Sup. 689, cited by appellant in its brief (Br. pp. 9, 11), it appeared that although the merchandise (rhubarb) was received prior to March 5th, 1941, no complaint as to the quality of the merchandise was made until February, 1942. The only complaint made prior to February, 1942, was that the market was flooded and that the buyer was forced to pack the rhubarb to keep it from going to waste. The other authorities cited by appellant, when applied to the facts of the instant case, do not support a finding contrary to the one made by the District Court. Inasmuch as they are decisions of inferior courts, they will not be individually discussed.

Appellant does make certain statements of fact, however, in its brief (Br. pp. 11, 12), that do not accurately reflect the evidence and are unsupportable in the light of the findings of the District Court. Thus, appellant states:

> (1) ". . . it is unequivocable that the first complaint, to-wit, that of Ashby's conversation on or about November 29, 1943 was withdrawn on or before December 3, 1944, and that the first notice which complies with the requirements of the above cases was that of Ashby's letter of January 20, 1944." (App. Br. p. 11.)

The evidence in support of the Court's finding has been fully reviewed but it is submitted that the testimony clearly establishes that Ashby retained the fudge on the understanding that settlement would be made for that part of the fudge that was defective and unmerchantable. [Tr. pp. 70, 366-368.] Bower discussed the claim of Sears for its defective fudge prior to Christmas. [Tr. pp. 330-332, 334-335, 370-371, 373.]

(2) ". . . The evidence clearly indicates that the appellant did not consider the mere complaints a notice. The evidence of Bower's knowledge was merely that the buyer was having sales difficulties and that it was not wholly pleased with its purchase." (App. Br. p. 11, lines 24-29.)

The evidence, on the contrary, clearly shows that Bower knew that Sears would make a claim for its defective fudge as disclosed by his conversations with the manufacturer prior to Christmas. [Tr. pp. 330-332, 334-335, 370-371, 373.]

(3) ". . . The payment of the invoices by buyer negatives any prior complaint as constituting notice." (App. Br. p. 11, lines 29-31.)

The evidence clearly establishes in view of the findings that the invoices were paid upon the understanding that a settlement for the defective fudge would be made at the time the quantity of unmerchantable fudge was ascertained. [Tr. pp. 68-70, 366-368.] Despite appellant's statement to the contrary, nothing could be more unequivocal than appellee's conduct during this period.

(4) ". . . The evidence clearly indicates that candy is very perishable and particularly fudge. The perishability of fudge, as disclosed by the evidence, increases with the quantity of butter and cream used to make such fudge." (App. Br. p. 12, lines 13-17.)

The testimony is that fudge of this type properly prepared would keep from a minimum of four months to a year. [Tr. pp. 362, 369.] There was no testimony that the fudge was stored at room temperatures. On the contrary, it is clear that the fudge was stored in cold locations prior to sale. [Tr. pp. 81, 212, 221, 235-236, 246.] The only candy stored at room temperature was the part of the

sample Ashby kept in his office. This did not spoil although it got hard on the outside. [Tr. pp. 58-59.]

Appellant's argument in its brief (Br. p. 12), based upon judicial knowledge of the Court and the properties of butter and cream, is contrary to the findings of the District Court that

> "Defendant stored said candy in a careful and proper manner in its retail stores and sold at retail all of said candy that was of merchantable quality." [Finding V, Tr. p. 41.]

and is without any support in the evidence.

It is clear from the facts and from the applicable California decisions that the buyer gave ample notice within a reasonable time.

III.

The Buyer, Upon Showing That Merchandise Is Defective in Breach of a Warranty, Is Not Required to Prove the Cause of the Defective Condition or That the Cause Is the Result of Seller's Action.

The District Court found

> "The candy delivered to the defendant by plaintiff was not of merchantable quality, was not fit for sale in defendant's retail business, and did not conform in quality or condition to the samples submitted to defendant at the time it purchased the candy." [Finding IV, Tr. p. 40.]

It further found that

> "Of said 28,000 pounds of candy sold to defendant by plaintiff, 9,620 pounds were of unmerchantable quality, did not conform in quality to the samples, and were unfit for sale in defendant's retail business." [Finding VII, Tr. pp. 41-42.]

Appellant's argument that it is necessary for the buyer asserting a breach of warranty to prove the cause of the condition that constitutes breach of warranty and that the cause proved results from the seller's or manufacturer's action, is not a rule of law as appellant states in its brief. (Br. p. 14.) It is merely a confusion that exists in appellant's mind from an improper analysis of the decisions that he cites. An examination of *Consolidated Pipe Co. v. Gunn.* 140 Cal. App. 412, 35 P. (2d) 350, discloses that the buyer purchased certain well casing and installed it for use in a well. The casing broke in the well. The buyer attempted to show that the casing was defective at the time he purchased it by showing that he was using the well casing under normal operating conditions at the time it broke. The Court stated that there were so many risks involved in the use of the article and the hazard of damage was so great that even though the material might not be defective, it might nevertheless break. It held that proof of breaking "under normal condition" was not proof of defective quality.

An examination of *Cerruti Mercantile Co. v. Simi Land Co.,* 171 Cal. 254, 152 Pac. 727, cited by appellant in its brief (Br. p. 14), discloses that in an action for breach of warranty the proof of the buyer was that samples of the brandy taken two years after delivery were not of the standard desired by buyer. Seller showed that two months prior to the date of delivery the brandy was of the quality warranted. The Supreme Court held that the buyer, as plaintiff, had failed to prove that the wine was not of the quality warranted at the time of delivery.

Neither of these cases is authority for the proposition for which appellant cites them. It is clear that the breach of a warranty may be established by circumstantial evi-

dence. *Vaccarezza v. Sanguinetti,* 71 A. C. A. 880, (hear. den.), 163 P. (2d) 470. The two cases relied upon by appellant are holdings to the effect that the proof offered was not sufficient to meet the requirements of circumstantial evidence in the light of the other testimony in the case. The best answer to appellant's argument on this point would appear to be found in the holding of the Court in *Beyer v. Coca Cola Bottling Co.,* 75 S. W. (2d) 462 (Mo. App.), where, in a case involving a breach of warranty occasioned by the presence of a mouse in a bottle of coca cola, the Court held that it was not necessary for the buyer to show how the mouse got into the bottle but merely to show that it was in the bottle and that the coca cola was not as warranted. In the instant case, buyer, having shown that a substantial portion of the candy was unmerchantable at the time of the receipt of the candy, is not required to show facts which were the exclusive knowledge of the seller or the manufacturer.

IV.

The Measure of Damage Employed by the District Court Was Proper.

The measure of damages for breach of a warranty of quality is provided by subsection (7) of Section 1789, *Civil Code of California.* It provides as follows:

> "(7) In the case of a breach of warranty of quality such loss in the absence of special circumstances showing approximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

This measure of damage for the breach of warranty for quality is well established in California. The leading case is *Germain Food Company v. J. K. Armsby Co.,* 153 Cal. 585, 96 Pac. 319. In that case, there was a sale of apricots by sample. On arrival at point of delivery, the shipment was not comparable to the sample. The buyer was a dealer in fruits, having bought the apricots for resale. The lower court denied profits lost as an element of damage. The Supreme Court of California, in reversing the lower court, held that profits were a proper element of damage and that the difference in value of the apricots as received and the value of the apricots if equal in quality to the sample, was the proper measure of damage. This rule was applied in

Brandenstein v. Jackling, supra;

Pacific Sheet Metal Works v. California Canneries Co., 164 Fed. 980 (C. C. A. 9);

Porter v. Gestri, 77 Cal. App. 578, 247 Pac. 247;

Lichtenthaler v. Samson Iron Works, supra.

The District Court found that

> ". . . At the time the defendant purchased said candy and at the time defendant first gave notice to the plaintiff that such candy was of unmerchantable quality and did not conform to the samples, said candy, if it had been as warranted, and if it did conform to the samples, had a reasonable value to the defendant of 89¢ a pound in its retail business." [Finding IV, Tr. p. 40.]

The District Court further found

> "Of said 28,000 pounds of candy sold to defendant by plaintiff, 9,620 pounds were of unmerchantable

quality, did not conform in quality to the samples, and were unfit for sale in defendant's retail business. Defendant notified plaintiff that said 9,620 pounds of candy were unmerchantable and unfit for sale in defendant's retail business and requested plaintiff to pay for the damage suffered by defendant by reason of the breaches of said warranties. At the time defendant notified plaintiff that said 9,620 pounds of candy were unmerchantable, said candy, if it had been as warranted, had a reasonable value to defendant in its retail business of 69¢ a pound.

"Defendant, having paid in full for said candy, was damaged by breach of said warranties in the sum of 69¢ a pound for each of said 9,620 pounds, or in the total sum of $6,637.80." [Finding VII, Tr. p. 42.]

Appellant urges that "net profits" only should be the measure of damage, citing

Coates v. Lake View Oil & Refining Co., 20 Cal. App. (2d) 113, 66 P. (2d) 463;

Roach Bros. v. Lactein Food Co., 57 Cal. App. 379, 207 Pac. 419;

Boyles v. Kingsbaker Bros., 5 Cal. (2d) 68, 53 P. (2d) 141.

Coates v. Lake View Oil Co., supra, and *Roach Bros. v. Lactein, supra,* involve anticipatory breaches of contract. A breach of a warranty of quality was not involved. The measure of damages for such a breach of contract would be determined by Section 1787, *Civil Code.* In these cases, inasmuch as the buyer had not been put to any expense, the Court held that the allowance of

gross profits as the measure of damage would result in the receipt by buyer of a larger sum as damages than he would have received if in fact he had received the merchandise. The instant case is readily distinguishable in that the merchandise had been delivered, and, as the evidence showed, was placed and held in the various stores for sale. All of the merchantable candy had been sold. In such a case, the correct rule for the determination of damage is clearly the amount represented by the difference in the value of the actual merchandise to the buyer in its unmerchantable state and the value that it would have had to the buyer if it were as warranted. The expense incident to the handling and sale of the candy had been borne by buyer and it was therefore unnecessary to segregate its cost of sale. In effect, in allowing damage in the amount of 69¢ a pound, the District Court was allowing net profits rather than gross profit as an item of damage.

In *Boyles v. Kingsbaker Bros., supra,* cited by appellant (Br. p. 16), the buyer had refused to accept pears, alleging that they did not conform to the warranty of quality. The seller sold the pears at the market price, which, at the time of sale, was lower than the contract price. Seller then sued for damage for breach of contract. The court found that the pears were of the quality warranted and that the buyer was not justified in its refusal to accept the pears. The court then held that the measure of damage was the difference between the contract price and the market price at which the pears were sold, giving consideration to the cost of marketing. Inasmuch as the seller was put to the additional expense of sale, it would appear that the court allowed the cost of marketing as an additional element of damage. The

decision does not appear to be authority for the proposition for which appellant cites it, and is further distinguishable on the basis that it also involves a breach of contract rather than a breach of warranty of quality.

V.

Evidence Concerning the Condition and Quality of Shipments of Fudge of Which That Sold to the Buyer Was a Part Was Properly Admitted.

The District Court found

> "Plaintiff purchased said candy sold to defendant from the manufacturer thereof as a part of a larger quantity of said candy. Plaintiff and the manufacturer of said candy agreed upon and plaintiff received a substantial settlement from the manufacturer because of the unmerchantable quality of said entire quantity of candy, including that sold to defendant." [Finding VI, Tr. p. 41.]

The testimony was that the 28,000 pounds of candy sold to Sears by Bower was a part of a larger order that Bower placed with the manufacturer. [Tr. pp. 142, 329, 330—Exs. LL, MM.] The manufacturer sold directly to appellant and the particular shipments made to fill the order were not consigned to any particular customer of appellant. [Tr. pp. 146, 147.] Prior to Christmas, 1943, appellant made a claim to the manufacturer for settlement for all the defective fudge, including that sold to Sears. [Tr. pp. 146, 330-332, 334-335, 370-371, 373.] Mr. Pocius, the manufacturer, came to California, examined part of the fudge that Bower had on hand, found that it was unmerchantable [Tr. pp. 149-150], and made a settlement for the entire amount of candy

shipped to appellant. [Tr. pp. 41, 146, 151-155, 161-163.] Appellant's statement of the evidence and his argument under this point is based entirely on the testimony of Bower and does not reflect the complete state of the record. There was no error in the admission of this testimony. *Yick Sung v. Herman,* 2 Cal. App. 633, 83 Pac. 1089.

VI.

Buyer Was Not Estopped From Asserting Its Breach of Warranty nor Did Buyer Waive Its Claim for Breach of Warranty.

The District Court found

> "Defendant did not estop itself from asserting its claims for damage for breaches of said warranties by its acts or conduct at any time or in any manner." [Finding XI, Tr. p. 43.]

and further found

> ". . . Defendant did not at any time expressly or impliedly agree with plaintiff to discharge plaintiff from its liability in damages to defendant for breaches of said warranty." [Finding V. Tr. p. 41.]

While appellant urges that the buyer was estopped by its actions, conduct and statements, no authorities are cited to support its argument. Neither the controlling authorities nor the evidence supports appellant's assertion.

> "One relying on a plea of estoppel must have been ignorant of the true state of facts and must have been intentionally misled by the act of the other to his injury." *Killian v. Conselho Supremo Da Uniao Portugueza,* 31 Cal. App. (2d) 497, 88 P. (2d) 214.

The evidence clearly was that Bower was not misled by buyer's acceptance of the fudge after protest. Bower knew that the buyer not only was not satisfied with the fudge but that buyer was accepting the fudge only upon the understanding that a settlement would be made for all unsalable fudge. [Pltf. Ex. 7, Tr. pp. 70-71, 146, 330-332, 334-335, 366-368, 370-371, 373.] Nor did buyer purchase additional fudge on the basis of any representation that Ashby made to him. On the contrary, Bower purchased fudge knowing that Ashby was dissatisfied. [Tr. pp. 331-332.]

Appellant's assertions and its argument on this point are identical with those made on preceding points in that they do not reflect that there was a conflict in some of the testimony and do not accurately show the state of the record or the evidence upon which the District Court relied in making its finding. Inasmuch as many of the assertions of fact made by appellant have been discussed under preceding points, it appears that it would unduly burden this brief to point out the individual inaccuracies in its statements.

Of course, the buyer did not waive its right under its notice of breach of warranty in view of the understanding that was arrived at with reference to acceptance of the fudge; namely, that a settlement would be made for the unmerchantable fudge when the amount thereof could be ascertained. The buyer, in attempting to sell the unmerchantable fudge to Clark and buyer's effort to have the fudge recooked by the Triangle Candy Company was merely an effort to minimize the buyer's damage. [Tr. p. 104.]

VII.

The Finding That There Was an Express Warranty of the Candy Is Proper.

The District Court found

> ". . . Plaintiff expressly warranted that said candy would be of merchantable quality and would be in all respects fit and proper for sale in defendant's retail business." [Finding III, Tr. p. 39.]

At this point it should be noted that there is an error in the transcript in the finding immediately following the above quoted language. The District Court further found

> ". . . Plaintiff further impliedly warranted that such candy would be of merchantable quality, would conform in quality to the samples shown to the defendant, and would be otherwise free from defects rendering said candy unsalable in defendant's retail business." [Finding III, Tr. pp. 39, 40.]

In the preparation of the transcript the word "immediately" was erroneously substituted for the word "impliedly".

Paragraph 3 appearing on the reverse side of the purchase order given by the buyer to seller contained the following under bold-faced type: "Important: Please Note and Comply With Shipping and Billing Instructions."

> "All goods not fully up to standard, or shipped contrary to instructions, . . . or substituted for merchandise ordered, or not shipped in recognized standard containers, or not as per special specifications shown hereon, may be returned or held subject to and at shipper's expense and risk." [Deft. Ex. A, Tr. p. 60.]

It is submitted that the quoted provision is adequate to sustain the Court's finding of an express warranty that the fudge would be of merchantable quality. Despite appellant's contention that Bower did not participate in the discussion as to the quality of the fudge, it clearly appears that he did make representations as to the quality of the fudge to Ashby from the testimony of Erhart and Mitchell. Thus, Erhart testified [Tr. pp. 165, 166]:

> ". . . When he (Ashby) arrived he went to Mr. Bower's desk and Mr. Bower and Mr. Ashby at that time went over the fudge sample very thoroughly. They went back and forth about the price and quality, and there was some discussion with regard to the OPA by Mr. Ashby or Mr. Bower, and Mr. Bower turned to myself and my associate, and it went along. The result of the conversation and the examination of the sample, was that Mr. Ashby gave Mr. Bower a purchase order in the amount of 28,000 pounds of fudge."

Mitchell testified [Tr. p. 267]:

> "After about an hour or so had passed Mr. Ashby arrived. I don't believe I had ever met Mr. Ashby before. Mr. Bower introduced Mr. Ashby to Mr. Erhart and myself. Mr. Bower then related to Mr. Ashby what Mr. Erhart and I had told him in regard to the fudge."

Ashby testified [Tr. p. 56]:

> ". . . Then I asked him what was in the fudge, and while Mr. Bower himself did not answer that directly, the other gentlemen who were selling the merchandise explained what was in it. They showed me the label on the fudge, which backed up their claim that it contained real butter, top quality pecan

nuts, and the proper amount of sugar and seasoning, and various other ingredients that go into fudge. Judging from that, and, as I say, that it looked . . .

"After what the gentlemen pointed out as the ingredients of the fudge, and it was on their label backing up what they said, and the appearance of the fudge was good, I then brought up the matter of price."

It is further submitted that Erhart and Mitchell, in the transaction, were acting as the agent of Bower in making the sale to Ashby and that representations and warranties made by them would be the statement of Bower for the purposes of this sale.

VIII.

The Finding That Appellant Expressly Requested Appellee to Continue to Accept Shipments of Fudge Was Proper.

The District Court found:

". . . At plaintiff's express request, defendant continued to accept further shipments of candy until the entire 28,000 pounds had been received." [Finding V, Tr. p. 41.]

The evidence supporting this finding has been adverted to at several prior points in the brief. Ashby had told Bower that he (Ashby) would not accept any further shipments of fudge and would stop payment on checks theretofore issued in payment of the fudge. [Tr. p. 12.] After Erhart examined some of the fudge in the Ninth Street store upon Ashby's complaint to Bower, the evidence in support of the finding is that Ashby told Erhart

that he would attempt to dry the fudge out but could not ascertain the amount of fudge that was unsalable without going through all of the cases in all of the stores; that he would go along with the 90-pound adjustment until he was about to find out exactly how much was unsalable. Ashby also told Bower that he would try Erhart's suggestion, and it was agreed that a settlement would be made on that part of the fudge that was not merchantable. [Tr. pp. 70, 366-368.]

Prior to Christmas, Bower discussed with the manufacturer that Sears planned to make a claim for its defective fudge. [Tr. pp. 146, 330-332, 334-335, 370-371, 373.] It is submitted that the evidence was ample to support the finding.

IX.

The Finding That an Adjustment Was Made by Seller With the Manufacturer on a Basis Which Included the Fudge Received by Appellee Was Proper.

The District Court found:

> "Plaintiff purchased said candy sold to defendant from the manufacturer thereof as a part of a larger quantity of said candy. Plaintiff and the manufacturer of said candy agreed upon and plaintiff received a substantial settlement from the manufacturer because of the unmerchantable quality of said entire quantity of candy, including that sold to defendant." [Finding VI, Tr. p. 41.]

The evidence in support of this finding has already been reviewed at several points in the brief. However, for the sake of clarity in the light of appellant's assertion, the evidence will be briefly reviewed again.

Prior to Christmas, Bower had several discussions with the manufacturer relating to the unmerchantable quality of the fudge and demanded a settlement. As a part of these discussions, the fact that Sears, Roebuck and Co. was making a claim for its defective fudge was discussed by Bower with the manufactturer. [Tr. pp. 144-146, 333-336, 370-371, 373.] As the result of these conversations, the manufacturer came to Los Angeles prior to New Year's. He examined the fudge in Bower's office and stated that some was unusable and some was usable. [Tr. pp. 144, 149-150.] All of the fudge in the warehouse was not examined, nor was the amount of merchantable fudge determined. A settlement was made between Bower and the manufacturer on the entire amount of fudge shipped. [Tr. pp. 146, 152-153, 162, 163.]

Conclusion.

It is respectfully submitted that the judgment entered in the District Court be affirmed.

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Dated June 13th, 1946.